Comparative Studies
in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

Band 4

The Trial Jury in England, France, Germany 1700–1900

Edited by

Prof. Dr. Antonio Padoa Schioppa

Duncker & Humblot · Berlin

The Trial Jury in England, France, Germany 1700–1900

Comparative Studies in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen und anglo-amerikanischen Rechtsgeschichte

Herausgegeben von

Prof. Dr. Dr. h. c. mult. Helmut Coing

und

Prof. Dr. Knut Wolfgang Nörr

Band 4

The Trial Jury in England, France, Germany 1700–1900

Edited by

Prof. Dr. Antonio Padoa Schioppa

DUNCKER & HUMBLOT / BERLIN

Gedruckt mit Unterstützung der Gerda Henkel Stiftung, Düsseldorf

CIP-Titelaufnahme der Deutschen Bibliothek

The **trial jury in England, France, Germany** : 1700-1900 / ed. by Antonio Padoa Schioppa. — Berlin : Duncker u. Humblot, 1987
(Comparative studies in continental and Anglo-American legal history; Bd. 4)
ISBN 3-428-06178-0
NE: Padoa Schioppa, Antonio [Hrsg.]; GT

Satz: Hagedornsatz, Berlin 46
Druck: Berliner Buchdruckerei Union GmbH, Berlin 61
Printed in Germany

ISBN 3-428-06178-0

Inhaltsverzeichnis

Introduction

In the history of the relationship between the Common Law and the legal systems on the Continent, the Jury occupies a place of particular importance. In no other case perhaps have such ardent attempts been made to transplant an institution that is typical of English law into the soil of Civil Law systems. Thus, research on the jury is indispensable to any comparative history of law which has the object of enquiring into these relations.

It would be quite impossible to condense the whole history of this institution into a single book. What we have tried to do here has been to take some aspects of it and to trace certain examples of the development of the jury in two important juridical areas of the Continent — France and Germany — taking as a starting point the historical situation in England immediately before the French Revolution.

The two opening studies in the book deal with the English jury and are based on original research carried out by their writers in recent years. John Langbein's essay presents a picture of the Common Law jury built up from eighteenth-century sources, particularly from legal records.[1] From the point of view of comparative history, the chief object of his attention is the criminal jury — the only one to have been adopted on the Continent — even if civil and criminal juries in eighteenth-century England were subject to the same discipline. Both the ordering of the criminal law system and the characteristics of pre-trial procedure offer significant points of interest for this historical and comparative assessment.

The criteria for selecting jurymen, their social attributes and other requirements are all explained. The author rightly draws attention to those aspects of procedure that were either already obsolete in the eighteenth century (for example the Grand Jury) or were to grow up in later times (for example, the rules of evidence), aspects which for various reasons could not be appreciated by foreign observers. But what is of prime importance is the reconstruction of trial procedure, the distinction between the prosecution case and the defense case, the emphasis on the spoken word through the hearing of witnesses and

---

[1] Cf. the important article by *John Langbein*, Shaping the Eighteenth-Century Criminal Trial: The View from the Ryder Sources, in University of Chicago Law Review, 50 (1983), pp. 1-136.

cross-examination, and the illustration of the relationship between the judge and the members of the jury, this last being of fundamental importance for understanding the similarities and differences in comparison with Continental juries.

In this connection the basic distinction between the question of fact, which lies with the jury, and the question of law, lying with the judge, takes on particular importance. At various times in England — in the decades before the Revolution of 1688 and again during the eighteenth century — attempts were made to introduce a much broader conception of the powers of the jury: that not only the ascertaining of fact but also the matter of law-finding should fall within its competence. The reasons for this trend among English juridical and political writers and its development are dealt with in the essay by Thomas Green, who has written an important book on the history of the jury.[2] In the essay he discusses the various opinions of law reformers on this crucial question, citing the most important law cases, from Bushel's case in 1670 to the Seven Bishops' case in 1688, from Rex v. Franklin in 1731 to the Owen case in 1752 and right up to Lord Mansfield's sentences in 1770 and the St. Asaph case in 1783. The entire controversy centered on the highly political and ideological question of Seditious Libel and the power of the jury with regard to press offenses (a subject that was to cause renewed strife on the Continent in the nineteenth century); it was settled by Fox's Libel Act in 1792, which upheld the traditional distinction between the jury and the judge but nevertheless gave juries a power of acquittal or conviction which had not been recognized before in the same terms, at least in so far as this matter was concerned.

Little or nothing of this controversy was known in France. When the French constituants set about reforming France's legal system between 1789 and 1790, they were inspired by an admiration for English criminal law which went back to Montesquieu and the philosophes.[3] Without doubt the constituants (even the best-informed and most enthusiastic champions of the English model, like Duport and Chabroud) had no notion of the way in which trial by jury actually worked, on which light has now been thrown by the work of Langbein, Green, Beattie and other historians. Knowledge of the English system in Revolutionary France was largely culled from books, particularly from De Lolme and Blackstone, who had twice been translated in Paris. But comparison with the model is essential for an adequate historical assessment of the law that introduced the jury on the continent.

---

[2] *Thomas Andrew Green*, Verdict According to Conscience, Perspectives on the English Criminal Trial Jury, 1200-1800, Chicago and London 1985.

[3] *Antonio Padoa Schioppa*, I 'philosophes' e la giuria penale, in Nuova Rivista Storica, 70 (1986), pp. 107-146.

The birth of this reform is the subject of the third essay in the book, the aim of which is to describe the development of the Constituante's work in greater detail than has been undertaken before. After an examination of the initial projects, the debate in the Assembly in its two crucial stages — March and April 1790 (when it was decided to adopt the criminal jury but not the civil jury) and from December 1790 till February 1791 (when the rules for the criminal jury were discussed in detail) — is followed step by step, showing the contentions of the main people concerned (Duport, Thouret, Tronchet), as well as other significant contributions. The basic rule of oral procedure was thoroughly discussed in January 1791 and connected with the rule of the 'intime conviction' of the jurors, as opposed to the statutory proofs and to the written procedure that were characteristic of the ancien regime. The author then exposes the main aspects of the jury regulation that emerged from the great law of September 16th, 1791, focusing on the social and economic status required for serving on a jury, on the procedure for jurors' statements, and on the relationship between jurors and judges. The sharp distinction between the task of the jurors and that of the judge, so typical of the revolutionary statute of 1791 and so different from the English system, has had very far reaching effects on the Continent. Of course, an examination of the subsequent history and working of the new institution in the years immediately after its creation would require further research.

Very little was hitherto known of the developments and changes of the jury that took place in France in the nineteenth and twentieth centuries. Bernard Schnapper's essay traces for the first time the various stages of a fascinating story which has been going on over a period of nearly two centuries. It is a story in which ideological motives interweave with changing political tendencies and situations. From the early stages, when it was the 'Prefet' who had the task of choosing and disciplining the members of the jury, to the years that saw a return to increasing the discretionary power of the judge; from the bold innovations of 1848 to the Second Empire's restoration work in the choice of jurymen and in progressive 'correctionnalisation' of the criminal system — which by this time left only the most sensational trials, "les cas bien sanglants", to the Assize courts and therefore to the juries, removing from them all routine cases — the jury underwent continual changes. These are illustrated not only from legislative innovations but also from contemporary pamphlets and from the positions taken by magistrates, as shown by consideration of the records. Towards the end of the century, and later during the twentieth century, various attacks on and defenses of the jury originating in scientific and forensic circles brought about the gradual overcoming of separation between juries and judges which had its origins in the Revolutionary legislation of 1791; an